United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 74-2557

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United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LIZDALE KNITTING MILLS, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Company's contention (Br. 14-19) that it has both a statutory and constitutional right to copies of the affidavits of the General Counsel's witnesses prior to the hearing is patently without merit.[1] It is well settled that the Board's procedures need not provide

[1] The only case the Company relied upon to support its position (Br. 17), *McClain Industries, Inc. v. N.L.R.B.*, 381 F.Supp. 187 (E.D. Mich., 1974), was summarily reversed by the Sixth Circuit Court of Appeals on the gound that the District Court had no jurisdiction to order the Board to provide the company with the names of the complaining witnesses. ____ F.2d ____, 88 LRRM 2071, 2072 (December 19, 1974).

for this or any other type of pre-trial discovery. See *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-860 (C.A. 2, 1970), cert. denied, 402 U.S. 915, and cases cited therein. The reason for this rule is not "shop-worn," as the Company claims (Br. 15), but quite simple and viable today, as numerous courts have recognized:

> If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement.

N.L.R.B. v. National Survey Service, Inc., 361 F.2d 199, 206 (C.A. 7, 1966), quoted with approval in *Wellman Industries, Inc. v. N.L.R.B.*, 490 F.2d 427, 431 (C.A. 4, 1974), cert. denied, 419 U.S. 834, where the court held for the same reason that affidavits obtained by a Board investigator during his inquiry into union objections to a Board representation election were exempt from disclosure under exemption 7 of the Freedom of Information Act (5 U.S.C., Sec. 552(b)(7)). The Administrative Law Judge here thus did not err by denying the Company's motion to produce (Br. 15, 20). See *N.L.R.B. v. Automotive Textile Products Company, Inc.*, 422 F.2d 1255, 1256 (C.A. 6, 1970).

Moreover, contrary to the Company's claim (Br. 17-18), there is no showing that it was prejudiced because it did not know in advance of the hearing that the view from the main office was to be a crucial issue in this case. Early in the hearing it became evident that this was one of the principal issues. The Company could have requested a recess then to secure the type of evidence it now claims would have brought the matter into "sharp focus" (Br. 18). It failed to do so even though the Company's plant was within an hour's drive of the hearing room, and thus it cannot now complain. In any event, that issue was fully litigated and both the Judge and counsel personally viewed the premises.

Finally, under the Board's Rules and Regulations (29 C.F.R.) Section 102.118, which implement and fully satisfy the procedural due process requirements elaborated in *Jencks v. United States*, 353 U.S. 657 (1957), the Company was entitled to the affidavits for purposes of cross-examination only after the witnesses had testified on direct examination for the General Counsel. See, generally, *Harvey Aluminum v. N.L.R.B.*, 335 F.2d 749, 752-754 (C.A. 9, 1964). Since the Company received the affidavits at the proper time, no prejudicial error occurred.

2. Equally baseless is the Company's claim (Br. 11, 13) of "blatant bias and prejudice of the Administrative Law Judge." The Company relied solely upon the fact that the Judge chose to credit the General Counsel's witnesses and to disbelieve the Company's witnesses (Br. 10). It is well settled that this does not establish bias. *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659-660 (1949).

3. Also without merit is the Company's assertion (Br. 14) that the Board impermissibly found a violation in conduct which had not been alleged in the complaint, *i.e.*, the Company's ordering the Union representatives out of the plant when they were trying to get the Ceballos group reinstated. However, this "issue was fully litigated at the hearing and there was no showing of surprise which may have hampered presentation of [the] defense. . . ." (*N.L.R.B. v. Roure-Dupont Mfg., Inc.*, 199 F.2d 631, 633 (C.A. 2, 1952)), and the Board so found (A. 24).

CONCLUSION

For the reasons stated above, as well as those stated in our opening brief, it is submitted that the Board's order should be enforced in full.

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April 1975

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LIZDALE KNITTING MILLS, INC., Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 18th day of April, 1975.